FILE COPY

Supreme Court, U. S.
FILED
MAR 5 1973
[illegible]

In the Supreme Court of the United States

October Term, 1972

No. 72-944

LILLIAN MARULAKIS, *et al.*,
Petitioner,

vs.

CHESTER L. WILLIAMS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK J. DONNER
11 East 51st Street
New York, New York 10022
Attorney for Respondent

Of Counsel:
DAVIS AND HANDELMAN CO., L.P.A.
1110 Euclid Avenue
Cleveland, Ohio 44115

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 631-5647

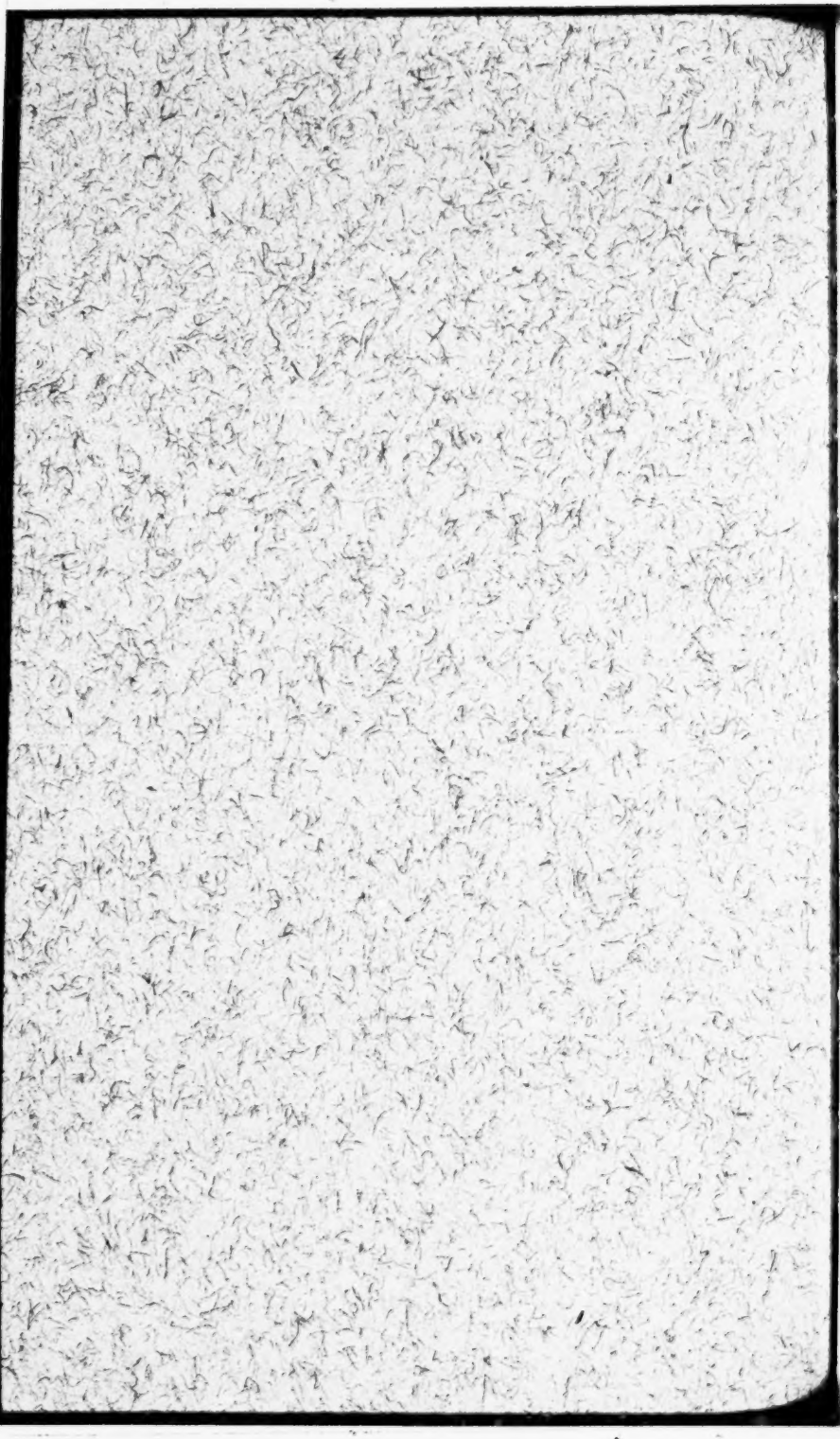


TABLE OF CONTENTS

Opinions and Journal Entry Below 1

Jurisdiction 1

Constitutional Provisions and Statutory Provisions Involved 2

Question Presented for Review 2

Statement of the Case 3

Argument 7

I. Where there is judgment against the defendant in a suit for personal injury, where there is service by leaving a copy of summons at defendant's usual place of residence, pursuant to Ohio R.C. § 2703.08, there is no abuse of discretion by a trial court, upon hearing, in denying a motion to quash service where, upon hearing, testimony was adduced that the challenged service address was the same as defendant's place of residence on her: (1) Application for a Master Charge card (Tr. Plaintiff's Exhibit No. 1); (2) Renewed driver's license; and (3) Reinstated voting registration (Tr. Plaintiff's Exhibits 4 & 5) 7

II. When a person's legal residence is once fixed, it requires both fact and intention to change it 11

III. The burden is on the one challenging the legality of service of summons to show by clear and convincing evidence the inaccuracy of the return 12

IV. Petitioner's motion to quash must be promptly filed once it is learned that the lawsuit has been filed 13

V. The Petition does not present an important federal question or a conflict in decisions, but turns on narrow factual considerations limited to the present case 14
VI. The decision below is manifestly correct 15

Conclusion 15

TABLE OF AUTHORITIES

Cases

Antonopoulos v. Eisner, 30 Ohio App. 2d 187 (1972) 13
Caldas v. Caldas, La. App. 1969, 224 So. 2d 831 ..... 7, 8
Farley v. Pickett, 177 Ohio St. 133 13
Hackner v. Guaranty Trust Co. of New York, C.C.A.N.Y. 1941, 117 F.2d 95, cert. denied, 61 S. Ct. 835, 313 U.S. 559, 85 L. Ed. 1520 ..... 8, 10
Hayes v. Kentucky Joint Stock Land Bank of Lexington, 125 Ohio St. 359 (1932) 13
Hoffman Motors Corp. v. Alfa Romeo S.p.A., D.C. N.Y. 1965, 244 F. Supp. 70 ..... 8, 9, 10
Hutson, In re, 165 Ohio St. 115 11
McDonald v. Mabee, 243 U.S. 91 (1917) 11
Mullane v. Central Hanover Bank & Trust Co., 70 S. Ct. 652, 339 U.S. 306, 94 L. Ed. 865 ..... 8, 9, 10
Pennoyer v. Neff, 95 U.S. 714 ..... 11, 12
Simon v. Erwin, 84 O.L.A. 26, 167 N.E.2d 680 12

Constitution and Statutes

Constitution of the United States, Amendment XIV, Sec. 1 ..... 14, 16

Ohio Revised Code, Section 2703.08 ..... 2, 7, 9, 16
Louisiana Statute, Art. 1234 8
18 OHIO JUR. 2d, 1970 Supplement 11
RESTATEMENT, SECOND CONFLICT OF LAWS (1971) § 30 12

In the Supreme Court of the United States

October Term, 1972

No. 72-944

LILLIAN MARULAKIS, *et al.*,
Petitioner,

vs.

CHESTER L. WILLIAMS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS AND JOURNAL ENTRY BELOW

Identification of the opinions and journal entry delivered in the Courts below are set forth in the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions and the statutory provisions involved are set forth in the Petition for Writ of Certiorari at page 2.

QUESTION PRESENTED FOR REVIEW

In a personal injury action where service is had under the Ohio statute R.C. § 2703.08, by leaving a copy of the summons "at her usual place of residence," is there an abuse of discretion by the Ohio Courts in denying petitioner's motion to quash service, and ruling that the required intent to change residence was not proven, where the place of service was the same as the petitioner's place of residence on her:

1. Application for master charge card (Tr. Plaintiff's Exhibit No. 1)
2. Renewed driver's license
3. Reinstated voting registration (Tr. Plaintiff's Exhibits Nos. 4 & 5)

and when petitioner travelled to California but returned to her residence after the challenged service of February 27, 1969 and prior to departing for Greece, where she did not consummate a marriage, and moreover failed to challenge the service of summons for at least 5 months after knowledge of such service. (Tr. 12, depositions of defendant, dated May 21, 1971.)

STATEMENT OF THE CASE

On November 3, 1968 an intersection collision between two automobiles, one operated by Chester L. Williams, respondent, and the other operated by Lillian Marulakis, petitioner, occurred in Cleveland, Ohio. Suit was filed on February 20, 1969 in the Cuyahoga County Court of Common Pleas by respondent against petitioner and others, for injuries suffered by respondent in the accident, bearing Case No. 872614.

At the outset we should lay at rest the totally unsupportable contention of petitioner that this was a minor traffic collision, as contended in her Petition For Writ of Certiorari, at page 4:

> "The petitioner herein now has a non-meritorious default judgment against her for an unconscionable sum of money as a result of a minor traffic collision."

The respondent as well as the petitioner and her father William Marulakis, were all taken to a hospital immediately following the intersection collision of November 3, 1968, where respondent was confined for an extended period and required surgery for "severe lacerations of rectum and head injury" and confined, and where petitioner and her father were treated for torn ligaments of left ankle and contusions of the forehead respectively, and released, according to the Cleveland Police Report.

To further lay at rest the unsupportable contention of petitioner that this was "a minor traffic collision," we refer this Court to the petition filed by Chester L. Williams, respondent herein, in the Cuyahoga County Court of Common Pleas, Case No. 872614, wherein he alleged the following:

". . . that he sustained injuries to his back, neck, head, legs, arms and internal organs, and aggravated and exacerbated a previously existing but dormant condition of the lumbar spine; that plaintiff was removed from the accident scene to a hospital where he remained a patient for about two months, and plaintiff continues to suffer severe pain and disabilities by reason of his injuries, which are permanent; that plaintiff incurred substantial expenses for hospital, nursing and medical care and has reason to believe that he will incur further hospital, nursing and medical care and expense, the extent of which he cannot at this time ascertain; that plaintiff was unable to engage in any employment and thereby lost substantial earnings and is as yet unable to return to work; that he has reason to believe and does aver that he will suffer further loss of earnings and that his ability to work has been permanently impaired; that plaintiff suffered a severe shock to his entire nervous system;"

Judgment for respondent was granted in the Cuyahoga County Court of Common Pleas in the sum of $30,000.00, and certainly is not "an unconscionable sum of money," but is a very modest award and judgment for the very severe injuries and the very substantial loss suffered by respondent Chester L. Williams.

On February 20, 1969 the petition was filed by respondent in the Cuyahoga County Court of Common Pleas and on February 27, 1969, copies of the summons and petition were served upon petitioner Lillian Marulakis at the place of residence 885 Perkinswood Boulevard, S.E., Warren, Ohio, the same residence address as appears in the Cleveland Police Report and other documents. Judgment was rendered for respondent against petitioner in the sum of $30,000.00 on October 8, 1969

On May 4, 1971, approximately 18 months after judgment was rendered for respondent in the Cuyahoga County Court of Common Pleas, as aforesaid, petitioner moved to quash service. Testimony and depositions, direct and cross, of petitioner and witnesses from the Trumbull County Board of Elections, the Ohio Bureau of Motor Vehicles with reference to driver's license application, and from Central National Bank of Cleveland, Master Charge Division, were considered by Common Pleas Judge Harry Jaffe at a hearing on July 28, 1971. Thereafter on December 6, 1971, after extensive briefs were filed by both parties, oral argument ensued, whereupon Judge Jaffe overruled petitioner's motion to quash service. The petitioner, in her appeal to the Ohio Court of Appeals, assigned one error: "The trial court abused its discretion in denying defendant-appellant's motion to quash service." The opinion of the Court of Appeals affirming the lower court is set out in petitioner's Petition for Writ of Certiorari.

On July 5, 1972, petitioner filed her Notice of Appeal to the Supreme Court of Ohio from the decision of the Ohio Court of Appeals, alleging that the case involves a substantial constitutional question and matter of great public interest. On October 5, 1972, the Ohio Supreme Court dismissed her appeal and overruled her motion to certify. Petitioner has now filed a Petition For Writ of Certiorari to the Supreme Court of the United States.

While petitioner left her residence in Warren, Ohio for California on January 6, 1969 to visit relatives, by petitioner's own admission, she returned to her residence in Warren, Ohio on April 20, 21 or 22, 1969. (See Tr. 12, deposition of defendant dated May 21, 1971 at pages 9, 11, 12, 13, and 14.)

By admission and/or contradiction, petitioner stated in an application for a Master Charge card (Tr. Plaintiff's Exhibit No. 1), dated January 12, 1971, that she had resided 25+ years at 885 Perkinswood Boulevard, S.E., Warren, Ohio, and that she had no other previous home address as of January 12, 1971.

While petitioner did travel to Greece on or about April 25, 1969, and did visit during other periods in Greece, she likewise continued to assert and/or contradict and/or admit, as revealed by Tr. Plaintiff's Exhibits 3, 4, and 5, that her residence was 885 Perkinswood Boulevard, S.E., Warren, Ohio. Exhibit 3, renewal for driver's license, reveals that, as of December 29, 1970, her address was the same as on the previous license which had been issued some three years prior thereto. The reinstated voting registration (Exhibits 4 and 5) reveals that, as of February 12, 1971, in admission and/or contradiction by petitioner, she wished to reinstate her voting registration and that she met residence qualifications since she had continued to reside at her present address in the State of Ohio for at least 1 year, and that she desired her registered address as of September 17, 1968 to be her present address. Without exception the place of challenged service was the same as petitioner's place of residence, as set forth by the Ohio Court of Appeals opinion, and by admission and/or contradiction in Tr. Plaintiff's Exhibits 1, 3, 4 and 5.

ARGUMENT

I.

Where there is judgment against the defendant in a suit for personal injury, where there is service by leaving a copy of summons at defendant's usual place of residence, pursuant to Ohio R.C. § 2703.08, there is no abuse of discretion by a trial court in denying a motion to quash service where, upon hearing, testimony was adduced that the challenged service address was the same as defendant's place of residence on her: (1) Application for a Master Charge card (Tr. Plaintiff's Exhibit No. 1); (2) Renewed Driver's License; and (3) Reinstated Voting Registration (Tr. Plaintiff's Exhibits 4 & 5).

The issue now sought to be advanced in the United States Supreme Court by petitioner is essentially the same issue that she sought to advance in the Cuyahoga County Court of Common Pleas, in the Eighth Ohio District Court of Appeals and in the Ohio Supreme Court, and in which she was totally unsuccessful, after lengthy hearings with many witnesses and other evidence challenging petitioner's motion to quash and affidavit. A perusal of the Petition For Writ of Certiorari reveals quite clearly that she has advanced no new theories or arguments, but is essentially restating the arguments and the legal theories which were advanced below in the three Ohio Courts which successively overruled her motion to quash service and denied her appeal.

The only cases which petitioner has cited in her petition in this Court that may not have been considered by Ohio Courts are *Caldas v. Caldas*, La. App. 1969, 224 So. 2d 831,

Hackner v. Guaranty Trust Co. of New York, C.C.A.N.Y. 1941, 117 F.2d 95, cert. denied, 61 S. Ct. 835, 313 U.S. 559, 85 L. Ed. 1520, *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, D.C. N.Y. 1965, 244 F. Supp. 70, and *Mullane v. Central Hanover Bank & Trust Co.*, 70 S. Ct. 652, 339 U.S. 306, 94 L. Ed. 865. Contrary to the argument of the petitioner at page 5 of her Petition for Writ of Certiorari in this Court, *Caldas v. Caldas, supra*, is not "a case similar to the instant case." *Caldas* is distinguishable from the instant case in several important and decisive respects.

Unlike *Caldas*, petitioner herein did not state that "[s]he no longer retained any assets or belongings" in Warren, Ohio; that "[s]he had no intention of returning to her former residence," nor did she state that she had a long-term lease on a property in Greece, nor did she indicate that Greece was her place of residence on her passport prior to her departure from the United States, nor had she notified any personal, business or governmental agency of any change of address from Warren, Ohio to Greece, and in fact the evidence reveals conclusively that petitioner was very transient. Upon precisely opposite conclusions of fact, the Court of Appeals for Louisiana, Fourth Circuit, in *Caldas*, concluded that the trial judge was correct in sustaining defendant's declinatory exceptions of insufficiency of service of process.

The Louisiana statute as to domiciliary service is Art. 1234, and reads as follows:

> "Domiciliary service is made when a proper officer leaves the citation or other process at the dwelling house or usual place of abode of the person to be served with a person of suitable age and discretion residing therein as a member of his domiciliary establishment."

The Ohio statute on service, with which we are herein involved, R.C. § 2703.08, states:

> "Service shall be made at any time before the return day, by delivering a copy of the summons, with the indorsements thereon, to the defendant personally, *or by leaving a copy at his usual place of residence.*" (our emphasis)

In *Mullane v. Central Hanover Bank & Trust Co., supra,* the Court, in an opinion by Justice Jackson, concludes that there are a few general principles that must be met as indispensable to the process due parties to litigation, and summarizes this by stating:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.* . . . The notice must be of such nature as reasonably to convey the required information, . . . and it must afford a reasonable time for those interested to make their appearance, . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied." (our emphasis)

As noted by the Ohio Court of Appeals, the petitioner herein had many opportunities to be apprised of the pendency of the action and thereafter was afforded an opportunity to present her objections by extensive and unhindered hearing afforded her.

In *Hoffman Motors Corp. v. Alfa Romeo S.p.A., supra,* the United States District Court for New York held that:

> "In order for service of process to be constitutionally valid there must be minimal contacts with the jurisdiction out of which process is issued. . . . It must also be served in a manner reasonably calculated to give a party actual notice of proceedings against him."

In the opportunity afforded petitioner for hearing, the Ohio Court of Appeals determined that she had more than minimal contact with the jurisdiction, in view of her admission in her application for Master Charge that she was in continuous residence at 885 Perkinswood, S.E., Warren, Ohio for 25+ years, and where during her absence, there was the continued presence of her parents and family. The Ohio Court of Appeals, as well as the lower court, likewise concluded that there was at least minimal contact with the jurisdiction in view of the other testimony, depositions and exhibits. (See Court of Appeals opinion, Petitioner's Appendix, pages 7, 8, and 9 in Petition for Writ of Certiorari.) See also *Mullane v. Central Hanover Bank & Trust Co., supra,* which case is cited by *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, with approval.

With regard to *Hackner v. Guaranty Trust Co. of New York, supra,* the Supreme Court denied certiorari and upheld the Circuit Court of Appeals decision that the particular statute was reasonably calculated to give the party actual notice of the proceedings and was therefore valid. Inherent in the Ohio Court of Appeals opinion herein is its finding that service on defendant was reasonably calculated to give her actual notice of the proceedings and adequate and ample opportunity to challenge the service.

II.

When a person's legal residence is once fixed, it requires both fact and intention to change it.

Intent alone to change residence, even if proven would not effect a change of residence for as enunciated in the recent Ohio Supreme Court case of *In re Hutson,* 165 Ohio St. 115 at page 119:

> "When a person's legal residence is once fixed, . . . , it requires both fact and intention to change it."

As summarized in 18 OHIO JUR. 2d, 1970 Supplement, at page 170:

> "To effect a change of domicil, it must be shown by a preponderance of the evidence, first, the abandonment of the former domicil, second, actual residence in a new location, third, intention that it be the permanent residence."

Both the Ohio Court of Appeals and the Court of Common Pleas for Cuyahoga County found "that the requisite intent to change residence properly may be deemed *not* to have been proven."

As a reading of the case of *McDonald v. Mabee,* 243 U.S. 91 (1917) reveals, the modern tendency is to expand the *in personam* jurisdiction of Courts over non-residents, as long as this expanded jurisdiction does not offend our traditional notices of fair play and substantial justice. Justice Field speaking in *Pennoyer v. Neff,* 95 U.S. 714, states at page 722:

> "Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . ."

The Restatement of Law in reviewing *Pennoyer v. Neff, supra,* and cases that followed thereafter, states in conclusion that mere residence provides jurisdiction unless the individual relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable. See RESTATEMENT, SECOND CONFLICT OF LAWS (1971) § 30. As the record herein reflects, the petitioner's relationship to the state and 885 Perkinswood, Warren, Ohio is anything but attenuated.

III.

The burden is on the one challenging the legality of service of summons to show by clear and convincing evidence the inaccuracy of the return.

Simon v. Erwin, 84 O.L.A. 26, 167 N.E.2d 680 Ohio Court of Appeals opinion from Meigs County in fact cites Ohio Law, and concurs on the following propositions of law at page 32:

> " 'The burden is on one challenging the legality of service of summons to show, by clear and convincing evidence, the incorrectness and inaccuracy of the return.' 22 Ohio App. at page 315, 153 N.E. at page 312.
>
> 'To overcome probative force of return of service of summons, clear and convincing evidence is required.' 25 Ohio App. at page 17, 157 N.E. at page 316."

The Ohio Court of Appeals for Cuyahoga County and the Court of Common Pleas have both hereunder concluded that there is no clear and convincing evidence of the inaccuracy or incorrectness of the return herein and that the "trial court's exercise of its discretion was not abused." See Journal Entry, Court of Appeals June 5, 1972.

IV.

Petitioner's motion to quash must be promptly filed once it is learned that the lawsuit has been filed.

A review of the case law including *Hayes v. Kentucky Bank,* 125 Ohio St. 359, *Farley v. Pickett,* 177 Ohio St. 133, and *Antonopoulos v. Eisner,* 30 Ohio App. 2d 187 (1972) reveals that relief from default judgment must be timely sought. In each of these cases the motion to vacate was promptly filed once it was realized that default judgment had been taken; for as stated in *Antonopoulos v. Eisner, supra,* at page 200:

> "Appellant's motion to vacate was promptly filed, once it was realized that the default judgment had been taken."

As stated by the Court of Appeals in the instant case, defendant-appellant ". . . knew of service for at least 5 months before challenging it. (cf. Tr. 15 and 28 and motion to quash service filed May 3, 1971)." In the instant case, unlike *Antonopoulos v. Eisner, supra,* as reflected in the Court of Appeals Journal Entry, petitioner's own conduct was hardly excusable; for as reflected, petitioner returned to her residence after service on February 27, 1969 and before leaving for Greece on April 24, 1969. In view of the fact that judgment herein was obtained on October 8, 1969, and that the motion for relief was not filed until May 3, 1971, Rule 60 of the Ohio Rules of Civil Procedure could have no application since the relief was not sought within the one year from time the judgment was taken, as required under this rule.

It should be further noted that by petitioner's own admission as revealed by the transcript and as set forth in her Memorandum in Support of Jurisdiction in the Ohio

Supreme Court at pages 2, 4 and 5, *Lillian Marulakis admits learning of the lawsuit in "the early part of 1970"* and that as revealed by the transcript, petitioner *did not file a motion to quash such service until May 3, 1971 or some 15 months after learning of the service.* Thus by admission, knowing of the service for at least 15 months before challenging it, it cannot be said that her motion to vacate was promptly filed.

V.

The petition does not present an important federal question or a conflict in decisions, but turns on narrow factual considerations limited to the present case.

The due process requirement of the Fourteenth Amendment of the United States Constitution has been satisfied in this case, beyond any doubt. A different situation might exist had no testimony been taken from petitioner, and had she not appeared for deposition and before the Cuyahoga County Court of Common Pleas and given evidence. To the same degree a different situation might have existed had petitioner not returned 2-3 days to her place of residence in April, 1969 before departing for Greece, and a different situation might have existed had she sought to vacate and quash the service of summons promptly when she returned to the United States and to her residence in Warren, Ohio, instead of waiting until May, 1971 to file a motion to quash service.

But in the instant case, none of these facts pertain and apply and it is clear that petitioner was afforded due process of law in all the Ohio Courts, from the lowest to the highest appellate level.

VI.

The decision below is manifestly correct.

We would be unnecessarily repeating the evidence as adduced upon deposition of petitioner and her testimony in the trial in the Cuyahoga County Common Pleas Court and as adduced from the exhibits and the testimony of the witnesses who appeared both for deposition and in the Common Pleas Court, were we to again review these matters which have been convincingly summarized and discussed by the Cuyahoga County Court of Appeals (appendix to Petition for Writ of Certiorari). The decision of the Ohio Courts was manifestly correct and petitioner's arguments fail to remotely approach the minimum level of importance and consequence required to warrant review by this Court.

CONCLUSION

It is amply demonstrated from the record in this case and from the opinion of the Ohio Court of Appeals (Appendix to Petition for Writ of Certiorari), that substantial justice has been afforded petitioner, and that the judgment of the Cuyahoga County Court of Common Pleas for Respondent was not for an "unconscionable sum of money," as argued by petitioner (Petition for Writ of Certiorari, page 4). On the contrary the respondent was very seriously and permanently injured and suffered very substantial loss for hospital and medical care and loss of earnings, and the judgment of the Court of Common Pleas was modest and totally reasonable.

Consideration by this Court of a particular finding pursuant to the Ohio statute R.C. §2703.08 and the facts of this case, involves a consideration which is limited to a specific action and will not ultimately be of broad applicability. It is respectfully submitted that the Fourteenth Amendment rights of the petitioner were protected both in the service of process and in the hearing of the objection to such service filed by petitioner, which followed thereafter, and that the Ohio trial court's exercise of its discretion was not abused. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANK J. DONNER
11 East 51st Street
New York, New York 10022
Attorney for Respondent

Of Counsel:
DAVIS AND HANDELMAN CO., L.P.A.
1110 Euclid Avenue
Cleveland, Ohio 44115